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No. 19

# In the Supreme Court of the United States

October Term, 1955

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MASTRO PLASTICS CORP., AND FRENCH-AMERICAN REEDS MFG. CO., INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE NATIONAL LABOR RELATIONS

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### OPINIONS BELOW

The opinion of the court below (R. 364-370) is reported at 214 F. 2d 462. The findings of fact, conclusions of law and order of the Board (R. 266-337, 339-360) are reported at 103 NLRB 511.

### JURISDICTION

The decree of the court below was entered on August 19, 1954 (R. 371-376). The petition for a writ of certiorari was filed on November 19, 1954,

and was granted on January 10, 1955 (348 U. S. 910). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board and the court below properly found that the "no-strike" clause in the agreement between the employer and the union in the instant case did not constitute a waiver of the employees' right to strike in protest against unfair labor practices committed by the employer.

2. Whether the 60-day "waiting period" prescribed by Section 8(d) of the National Labor Relations Act, as amended, applies to employees who engage in a strike, the purpose of which is not to terminate or modify an existing contract but to protest and remedy unfair labor practices committed by the employer.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 63-69.

## STATEMENT

### I. The Board's Findings of Fact

Petitioners, although separate corporations, operate within the same plant premises and utilize the services of the same employees and supervisory staff (R. 270; 1-2, 88, 117-118, 196-197, 209, 237). Mario Maccaferri is president of both companies, and his wife, Maria, is vice president and an active supervisor (R. 270; 109, 196-197). In 1949 and

1950, petitioners' employees were represented for purposes of collective bargaining by Local 22045, a federal labor union affiliated directly with the American Federation of Labor, hereafter called the Carpenters (R. 271-272; 9-10).[1] The current contract between petitioners and the Carpenters, which was to expire on November 30, 1950, contained the following no-strike and arbitration provisions (R. 273; 13, 255, 259-260, 262):

> 5. The Union agrees that during the term of this agreement there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement.
>
> 6. The Employers agree that there shall be no lockout during the term of this agreement.
>
> * * * * *
>
> 19. Disputes:
>
> (a) Should differences arise between either of the Employers and the Union or its mem-

[1] Local 22045 and Local 3127, United Brotherhood of Carpenters and Joiners of America, AFL, occupy the same business office and utilize the services of the same representative (R. 271-272; 3-5, 7-8). The right to represent petitioners' employees was transferred back and forth between the two unions, usually for reasons not here pertinent (R. 271-272; 11-12, 37-38). The court below treated the two Locals as a single labor organization (R. 365, n. 1). No issue in this case is affected by treating the two as one organization and, accordingly, we refer to them jointly as the "Carpenters."

bers as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement, such differences may be referred by either party, by giving one (1) week's written notice by registered mail to the other party, to a Conference Committee to settle such matter within one (1) week thereafter, either party may refer the matter to arbitration, as hereinafter provided. [sic] * * * The decisions of the Arbitration Board shall be binding upon the parties hereto and may be enforced by appropriate action in a Court of Law and Equity.

A. *Petitioners' attempt to replace the Carpenters with another labor organization of their choice*

In August 1950, Local 65 of the Wholesale and Warehouse Workers Union instituted an organizational campaign among petitioners' employees (R. 274; 13). Petitioners were opposed to the possible entry of Local 65 into the plant as they considered it to be Communist-controlled. They were concerned that Carpenters was not strong enough to cope with the organizational drive of Local 65, and decided to find other means to keep that organization out of the plant (R. 274; 15-17, 197-204). Accordingly, in September 1950 they sought out Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL, herein called the

Paper Workers, and invited that organization to take over the representation of the employees (R. 274-275; 17-26, 142-144, 197-198, 224-225). To achieve this result, petitioners first sought to induce Carpenters to transfer its bargaining rights to the Paper Workers; if necessary, Carpenters was to be "compensated" for its withdrawal (R. 275-277; 33-35). When Carpenters rejected this proposal, petitioners decided to achieve the desired result by themselves organizing the employees into the Paper Workers. They selected a committee of employees to visit the office of the Paper Workers to obtain membership cards and instructions for their completion (R. 278-280; 82-86, 98-102). Petitioners then directed the members of the committee, and several other employees,[2] to distribute the cards among the workers in the plant during working hours and to have them signed immediately (R. 280-281; 86-88, 99-102, 111-113, 132-138). Petitioners paid the committee for the time spent on behalf of the Paper Workers, and also paid several other employees for attending a meeting of that organization (R. 280, 287; 86-87, 102-103, 160-161, 175-176). Petitioners' officers and supervisors themselves participated in this organizing campaign, instructing employees to sign cards, and indicating that any

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[2] Among them was a machinist named Frank Ciccone, whose later discriminatory discharge became "the spark which set off the strike," discussed below (pp. 6-10). At this time, however, in order to gain Ciccone's cooperation, President Maccaferri suggested to Ciccone that there was a good possibility that the latter would be promoted to a position as a foreman (R. 281, 135).

who refused could "get out" (R. 280, 281-282, 283-284; 88-89, 100, 104-105, 111-113, 136-137, 153-154, 177-181, 189-190, 216-218). The campaign quickly achieved its purpose; by October 23 the Paper Workers obtained membership application cards from a majority of the employees (R. 285; 10, 201).

Although the employees had signed these cards under the pressure imposed by petitioners, outside the plant they clearly indicated that they wished to remain with the Carpenters. At a series of meetings held by the Carpenters the employees revoked their membership applications in favor of the Paper Workers and reaffirmed their adherence to the Carpenters (R. 287-288; 37-40). They also instructed the bargaining committee to continue to press for a new contract and for certain provisions to be contained therein (R. 287-288; 40).

Meanwhile, the Carpenters on October 10 had written to petitioners, requesting renegotiation and modification of the existing contract (R. 328, 348; 23-25, 263). Petitioners met with the Carpenters' representatives several times and listened to their proposals, but no agreement was reached (R. 275, 288, 289; 14-15).

### B. *The discriminatory discharge of Frank Ciccone on November 10*

At this stage, as the Board found, petitioners discharged employee Frank Ciccone for his advocacy of the Carpenters.

Ciccone had been employed by petitioners for about 4½ years prior to his discharge on November

10, 1950, as a machinist and maintenance mechanic (R. 289-290; 131). His work required him to go into the various departments of the plant to repair machines (R. 290; 131). Ciccone's foreman considered him an able and conscientious worker (R. 290; 204, 212-213).

As noted above, p. 5, n. 2, Ciccone had been requested by Maccaferri to participate in the organization campaign initiated by petitioners on behalf of the Paper Workers. However, Maccaferri's interest in the Paper Workers disturbed Ciccone, and he openly expressed his concern on this point on several occasions (R. 290; 127, 136-137, 140, 144). Ciccone was in the forefront of those critical of the attempt to bring "the boss' union" into the plant and thereafter undertook to recruit additional employees to join the Carpenters (R. 290; 125, 139-142). He carried on his organizational activities during lunch and rest periods, and before and after working hours (R. 290; 115, 130, 141-142). Admittedly, Maccaferri soon became aware of these activities (R. 291; 116, 142, 204).

At about 1 p. m. November 10, Maccaferri approached the bench in the machine shop where Ciccone was working, and upbraided him for his recruitment of employees into the Carpenters (R. 292; 147). Maccaferri then ordered Ciccone to remain in the machine shop and not to perform further any maintenance services in other parts of the plant (*ibid.*).

A few hours later, during their customary rest period, Ciccone and four other machinists decided

to buy drinks at a Coca-Cola vending machine located in a distant portion of the plant (R. 293-294; 116-117, 147-148, 226). Upon learning that Ciccone had left the machine shop, Maccaferri issued instructions that Ciccone be discharged at once (R. 294-295; 206, 210, 219). Ciccone was accordingly discharged and left the plant (R. 295; 117-118, 128-129, 149-150).[3]

### C. *The employees' strike in protest against petitioners' unfair labor practices*

Within ten minutes after Ciccone's discharge, the machine shop employees walked out on strike (R. 295; 118, 150), acting on the belief that Ciccone was discharged because Maccaferri desired to impose the Paper Workers on the employees (R. 297; 118, 129-130).

Word as to what had happened in the machine shop spread rapidly through the plant (R. 297; 91-92, 108-109). The men in the buffing room of the finishing department (R. 298; 172-173), all but three of the girls in the ukelele room of the finishing department (R. 299; 172-173, 181-182, 188, 195), and about three or four packing room employees (R. 299; 155-156, 157), also walked out to protest Ciccone's discharge. The next day, since all but a handful of employees had joined the strike, the plant was completely shut down (R. 304; 46).

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[3] Foreman Studli, who notified Ciccone of his dismissal, when asked by the latter for the reason for this action expressed the opinion that it was for union activity (R. 295; 117, 129, 149).

On the day of Ciccone's discharge, Foreman Ritacco told three employees that Ciccone had been discharged because of his activities on behalf of the Carpenters and that anyone else who went along with that union could expect like treatment (R. 297, 301; 92, 109, 164-165). Forelady Zwobodar told the ukelele room employees that Ciccone had been fired for his union activities; that the machine shop employees who had walked out in protest had also been discharged; and, to dissuade the ukelele room employees from joining the walkout, she told them that Maccaferri wanted the Paper Workers, that they could expect their demands to be met only through that union, and that to go along with the Carpenters and join the strike meant discharge under the contract (R. 299; 171, 184-185). In the packing room, directly supervised by Mrs. Maccaferri, the latter told an employee, "Frank [Ciccone] is not here no more. He's just been fired for making trouble with [the Carpenters]. And if anybody else starts the same thing, they'll be going just like him" (R. 300; 155, 156-157). At the close of the shift, Mrs. Maccaferri spoke informally to the employees as they were leaving, urging them not to join the strike, expressing her husband's determination to see the Paper Workers become the employees' bargaining representative in the plant, and indicating it would be foolhardy and useless for the employees to oppose her husband's wishes (R. 300-301; 158). Finally, addressing the night shift employees of the moulding department who had reported to work before the picket line was formed,

Maccaferri expressed his approval of the Paper Workers and his opposition to the Carpenters, and stated that before he would deal with the latter he would close the plant (R. 302-304; 165, 168-169, 192).

D. *Petitioners' discharge of the strikers and refusal to reemploy them upon their unconditional application*

The day after the strike began, the Carpenters' attorney and business agent, Abraham Saul, urged Maccaferri to put Ciccone back to work, but Maccaferri refused stating that Ciccone was "no damn good" (R. 304-305; 45-46). Maccaferri later repeated that he wanted nothing further to do with Ciccone, nor with seven or eight other named employees prominent in Carpenters' activities (R. 305).

The plant remained closed until December 11, 1950, when employee O'Neill, who had been most active on behalf of the Paper Workers (R. 278-280; 82-86, 98-102), having organized a back-to-work movement, induced 16 employees to report for work; they were reinstated upon their application (R. 305; Tr. 602, 1135). On the same day, petitioners addressed a form letter to other employees, effecting their discharge (R. 305; 51, 264):

> We do hereby advise you that due to your breach of contract with us, which did not expire until November 30, 1950, by going out on strike on November 10, 1950, in violation of the

provisions of the contract, we have terminated your employment with this corporation.

On March 9, 1951, by registered letter, the Carpenters made an unconditional application for reinstatement on behalf of all the striking employees (R. 307; 53-54, 265). Petitioners did not reply to this request, nor have they reinstated any of the strikers named in the Board's order (R. 307; 238). Before the unconditional application for reinstatement, petitioners had reinstated seven strikers in addition to the previous sixteen, and had also hired a substantial number of replacements (R. 307). After the unconditional application, petitioners hired numerous new employees instead of recalling the strikers (R. 307).

After the strike began and before the unconditional application for reinstatement, petitioners solicited strikers to return to work upon condition that they abandon the Carpenters. Maccaferri invited one employee to return to work on that condition, stating that his discharge would be rescinded if he were willing to give up the Carpenters (R. 307; 120); about Christmas, 1950, Maccaferri told several pickets, "Why don't you fellows get smart to yourself and come back to work and forget about [Carpenters], and I will give you back your Christmas bonus" (R. 307-308; 193); on another occasion, Maccaferri told several pickets that he would never sit down with the Carpenters, but if they wanted to return to work they could do so, provided they forgot about that organization (R. 308; 183); and

at still another time an employee similarly was urged by Maccaferri to forget about the Carpenters and to return to work (R. 308; 184).

### II. The Board's Conclusions of Law

The Board found that petitioners' objective was "to have [Paper Workers] substituted in the place and stead of [Carpenters] as bargaining agent" (R. 309). The Board found the proof "overwhelming" that, to this end, petitioners engaged in "unlawful interference with employee self-organizational rights," in violation of Section 8(a)(1) of the Act. (R. 308-309). More specifically, the Board found that in violation of their statutory duty petitioners had engaged in the following acts of interference, restraint and coercion (R. 313, 341):

> (a) inducing and encouraging the representatives of [Carpenters] to agree to substitute [Paper Workers] in its place and stead; (b) inducing and encouraging the representatives of [Paper Workers] to engage in a campaign to displace [Carpenters] as the bargaining agent of their employees; (c) sponsoring, supporting and assisting the organizational campaign of [Paper Workers]; (d) giving financial rewards to employees active in the organizational campaign of [Paper Workers]; (e) inducing employees by threats, warnings of reprisal, and promises of benefit to become and remain members of other competing unions; (f) making abandonment of membership in or activities on behalf of [Carpenters] a condition of continued or new employment, after

> the start of the strike; and (g) soliciting employees engaged in picketing and other strike activities on behalf of [Carpenters] to abandon such activities, and promising benefits to induce them to do so.

The Board also found that, in violation of Section 8(a)(3) and (1) of the Act, petitioners discharged employee Ciccone because of his opposition to the Paper Workers and his advocacy of the Carpenters (R. 314-317, 341-342). The Board further found that the strike was caused by these unfair labor practices, and prolonged by petitioners' continuing unfair labor practices, and that accordingly petitioners, by discharging the strikers and thereafter refusing to reinstate them upon their unconditional request for reinstatement, further violated Section 8(a)(1) and (3) (R. 319, 331, 342, 350). Finally, the Board found that by the foregoing conduct, petitioners had rendered "illegal sponsorship, assistance, and support" to Paper Workers, in violation of Section 8(a)(2) of the Act (R. 308, 313, 341).

The Board rejected petitioners' assertion that the strike was in violation of the no-strike provision of the collective bargaining agreement and also in violation of Section 8(d) of the Act and hence unprotected activity (R. 319-331, 342-350).[4]

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[4] Chairman Herzog and Member Murdock, dissenting in part, found merit in the Section 8(d) defense (R. 353-356), and in view of this conclusion, Member Murdock found it unnecessary to express an opinion on the contract defense (R. 345, n. 8).

### III. The Board's Order

The Board's order requires petitioners to cease and desist from (1) encouraging or discouraging membership in any labor organization by discrimination in employment, (2) discriminating in employment for the reason that employees have engaged in strike or other protected concerted activities, (3) sponsoring, assisting, or supporting any labor organization to become collective bargaining representative of their employees, and (4) in any other manner abridging the employees' exercise of the rights guaranteed them by Section 7 of the Act (R. 350-351). Affirmatively, the order directs petitioners (1) to reinstate Frank Ciccone and 76 named employees with back pay, (2) to withhold all recognition of Paper Workers unless and until certified by the Board as the bargaining representative, and (3) to post appropriate notices (R. 351-353, 357-360).

### IV. The Decision Below

The court below (Chase and Frank, JJ., with Swan, J., dissenting) accepted all of the Board's findings of fact and conclusions of law and enforced in full the Board's order (R. 364-370). Rejecting petitioners' contention that by engaging in a strike before the expiration date of the contract the employees had violated the no-strike clause and hence were not entitled to the protection of the Act, the court below stated that (R. 366), "since the strike was caused and prolonged by the [petitioners'] unfair labor practices, we agree with

the Board that it is not prohibited by the strike-waiver clause in the contract." The court held that the "clause must be interpreted in the light of the entire contract of which it is an integral part" and when so viewed "the inhibition which it imposes is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties" (R. 366). Here, the court stated, "Unfair labor practices in violation of the Act were in no way covered by the contract, nor did the contract provide means for combating them or settling disputes arising because of them. And, of course, [petitioners'] unlawful activities cannot be considered part of the normal relations of the parties" (R. 367).

The court also found without merit petitioners' further contention that because the strike occurred less than 60 days after the Carpenters' formal notice to petitioners of an intent to modify the existing contract (*supra*, p. 6), the employees who struck failed to comply with the "waiting period" prescribed in Section 8(d)(4) of the Act, and thereby lost their employee status. The court said (R. 368-369):

> Section 8(d)(4) of the Act deals with the obligation to bargain collectively in good faith and particularly with the termination or modification of existing bargaining contracts. After making provision for procedures looking toward the attainment of such ends, which

> contain conditions applicable both to employers and employees, a sanction is imposed upon employees as a coercive measure to prevent their use of the strike either to obtain or to prevent the termination or modification of a collective bargaining contract. The "sixty-day period" is a special period during which the status quo ante is to be maintained in respect to employer-employee relationships while the statutory method for bargaining as to existing contracts set up in the subdivision is being used; and a "strike within the sixty-day period" means a strike in interference with the use of that method. In other words, it is tied to the method by the modifying words "within the sixty-day period" and that tie limits the sanction Congress imposed upon the employees involved in the use of the statutory method and excludes strikes which are still protected activities because they are unconnected with the use of the method.

Accordingly, the court concluded that since the strike here "was caused solely by the unfair labor practices" of the petitioners, "and was not motivated by any purpose so to obtain any economic advantage by way of contract modification," Section 8(d) was not applicable, and the employees were therefore entitled to the full protection which the Act normally accords to unfair labor practice strikers (R. 368).

SUMMARY OF ARGUMENT

I

The Board and the court below correctly construed the no-strike clause in the agreement between petitioners and the Carpenters as not constituting a waiver of the employees' right to strike in protest against serious unfair labor practices. The clause must be read in the context of the whole agreement. The agreement, specifying in conventional form the conditions of employment for its duration, contained certain provisions relevant to the commitment undertaken by the parties to refrain from strikes or lockouts. Thus, it specified the substantive terms governing the employment relationship; the parties thereby contracted to be bound by those terms for the duration of the agreement and the no-strike, no-lockout provision was an express guarantee that there would be no resort to self-help to effect changes of the agreed terms during the life of the agreement. Similarly, the parties agreed upon a grievance and arbitration procedure for the peaceful settlement and adjustment of contract disputes; and the no-strike, no-lockout commitment was an express guarantee that there would be no resort to self-help with respect to those matters which the parties agreed were to be processed through the contractual adjustment procedure. It is evident from a consideration of the contract as a whole that the union did not give up the right to strike, nor the employer the right to lock-out, at large; other provisions con-

tained in the contract in exchange for which self-help was surrendered measure the extent to which the parties intended to relinquish resort to strike or lockout.

The contention that the no-strike commitment constitutes a surrender of the right to strike against unfair labor practices can find no support in any other part of the agreement. Licensing an employer to engage in unfair labor practices is not the *quid pro quo* for an agreement on employment terms. The grievance and arbitration procedure established by the agreement for the adjustment of disputes does not suggest that the employees have agreed to forego striking against unfair labor practices. The procedure applies only to disputes arising out of "differences * * * as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." Petitioners' unfair labor practices which caused the strike were not a "difference" within the purview of this provision; they had nothing to do with the meaning or application of the agreement and they were, therefore, beyond the scope of the contractual method for adjustment of disputes. It cannot be fairly inferred that the union relinquished the right to strike over a subject for which the contract provided no substitute method of settlement. In sum, the no-strike clause cannot reasonably be construed to mean more than that with respect to disputes arising out

of the contract and the normal day-to-day relations of the parties the union would not resort to strike action for the adjustment of such disputes.

Another important reason requires this result. The right to protest against unfair labor practices is fundamental. Under the Act employees who strike as a result of unfair labor practices normally have an absolute right to reinstatement upon unconditional application for reinstatement despite intervening replacement. If the strike here was in breach of the no-strike clause, the employees would have been engaging in unprotected activity and subject to peremptory discharge or discipline. To interpret the clause to forbid strikes against unfair labor practices would mean that the employees have surrendered special statutory protection with no showing that they have gained from the employer a corresponding consideration. Relinquishment of the employees' statutory right to reinstatement, as with any waiver of other statutory rights, should be clear and unequivocal. It should not be inferred from the general provisions in a collective bargaining contract which do not make clear that strikes caused by the employer's unfair labor practices were included in the prohibition.

Even assuming that the strike was in breach of the no-strike clause, petitioners may not assert as a defense a strike which was caused by their wrongful conduct. Petitioners' serious unfair labor practices constituted such provocation as to substantially hinder compliance with the no-strike

pledge. An employer should not be permitted to assert that his employees have forfeited their normal right to statutory protection because of an alleged contract violation flowing from the very strike which his illegal conduct has caused.

## II

Section 8(d), read as a whole, does not apply to strikes, unconnected with advancing any contract demand, to protest and remedy an employer's unfair labor practices. Section 8(d), as is evident from the whole of the section, is devoted entirely to the orderly functioning of the bargaining process. A strike or lockout is prohibited during the "waiting period" prescribed in the Section only when recourse to it is for the purpose of effecting changes in existing contract terms. The statutory scheme is based upon the hope that the prescribed "waiting period" of uninterrupted negotiation, with the assistance of governmental conciliators, will produce agreement without the need for resort to industrial strife. The Act therefore enjoins resort to economic warfare to compel either party to accede to the contract demands of the other before the expiration of the "waiting period." To give the prohibition against strikes or lockouts greater scope leads to consequences so incongruous that it cannot reasonably be inferred that Congress meant to require them. It would mean that a union, satisfied with its contract and not seeking modification of its terms, may strike against unfair labor practices, but that a union seeking modification,

and having given notice to that effect, loses that right during the 60-day waiting period. It would mean that a union without a contract, but in the process of negotiating one, may strike against unfair labor practices, while a union which has given notice of modification of termination of an existing contract and is negotiating a successor agreement may not strike against unfair labor practices for a minimum of 60 days. There is no discernible reason for making such incongruous distinctions or for assuming that Congress intended them. Unless the clear terms of the statute compel a construction so much at variance with the policy underlying it, it should not be so interpreted.

The legislative history confirms the view that Section 8(d) was not intended to apply to strikes called to protest unfair labor practices. The debates and committee reports suggest no broader scope for the Section than providing for an orderly method for negotiating successor agreements.

## ARGUMENT

### I

### The Board and the Court Below Properly Found that the "No-Strike" Clause in the Agreement Between Petitioners and the Carpenters Did Not Constitute a Waiver of the Employees' Right to Strike in Protest Against Petitioners' Unfair Labor Practices

Section 13 of the National Labor Relations Act, as amended, provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or

diminish in any way the right to strike, or to affect the limitations or qualifications on that right." The Labor Management Relations Act of 1947 contains only four such specific limitations on the right to strike.[5] It is not uncommon, however, for parties to collective bargaining agreements to waive that right by contractual arrangements. Such arrangements are known as "no-strike clauses" by which the union pledges to abstain from striking during the life of the collective bargaining agreement.

In *Joseph Dyson & Sons, Inc.*, 72 NLRB 445, 447, and in *Scullin Steel Company*, 65 NLRB 1294, 1318, the Board held that a strike conducted in breach of such a no-strike clause was an unprotected activity, and that employees engaged in it were therefore vulnerable to discharge, in the absence of a "showing that the [employer] had breached the contract or that the strikes were caused by any unfair labor practices * * * ."[6] The

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[5] Sections 8(b)(4), 8(d), 206-210, 305. Of these, only Section 8(d), providing for a "waiting period," is involved in this case (see *infra*, pp. 44-61).

[6] The Board has held that the right to strike, although protected by the Act, may be waived because such waiver tends to realize the purposes of the Act by encouraging the practice and procedure of collective bargaining rather than resort to industrial warfare. *National Electric Products Corp.*, 80 NLRB 995; *Singer Mfg. Co.*, 24 NLRB 444, 467. See also, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 237.

During the deliberation on the Taft-Hartley amendments to the National Labor Relations Act, the House Conference Report and Senator Taft referred to *Dyson* and *Scullin Steel*, *supra*, with approval and observed that "the Board held that strikes in violation of collective bargaining contracts were

threshold question presented here is, therefore, whether, as petitioners assert, the strike called by the Carpenters was in breach of the no-strike provision of the then current agreement between petitioners and the Carpenters so as to disqualify the strikers from the protection of the Act even though the strike was caused by petitioners' unfair labor practices.[7] The Board and the court below correctly, we think, rejected this contention. As we explain in detail *infra*, (1) the no-strike provision construed in the light of the whole agreement cannot fairly be read as a promise to refrain from striking against the commission of serious unfair labor practices, and (2) in any event, petitioners may not assert as a defense the breach of an agreement induced and therefore excused by their own wrongful conduct.

1. The basic reasons why the no-strike provision was not a commitment to refrain from striking against unfair labor practices were set forth by the court below. As it explained (R. 366-367):

> . . . since the strike was caused and prolonged by the respondents' unfair labor practices, we

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not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 39, in 1 Leg. Hist. 543, and 93 Cong. Rec. 6442, in 2 Leg. Hist. 1539. "Leg. Hist." refers to the two-volume edition of the "Legislative History of the Labor Management Relations Act, 1947" (U. S. Govt. Print. Off., 1948).

[7] As noted above (pp. 7, 8), the strike began on November 10, 1950, twenty days prior to the expiration date of the agreement.

agree with the Board that it is not prohibited by the strike-waiver clause in the contract. That clause must be interpreted in the light of the entire contract of which it is an integral part, not as an isolated waiver unrelated to the rest of the agreement, and the inhibition it imposes is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties. Instances of strikes to enforce changes in contract provisions which violate a no-strike clause, of which *Scullin Steel Company*; 65 NLRB 1294, and *Joseph Dyson & Sons, Inc.*, 72 NLRB 445, are examples, should be distinguished. The right of employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition. See *National Electric Products Corporation*, 80 NLRB 995. Unfair labor practices in violation of the Act were in no way covered by the contract, nor did the contract provide means for combating them or settling disputes arising because of them. And, of course, the respondents' unlawful activities cannot be considered part of the normal relations of the parties.

The Seventh Circuit, the only other Court of Appeals which has considered this issue, has fully concurred in the foregoing views. *National Labor Relations Board* v. *Wagner Iron Works*, 220 F. 2d 126, 139-141, pending on petition for certiorari, No. 185, this Term.

We submit that this reasoning is sound. The collective bargaining agreement, specifying in conventional form the conditions of employment to prevail in the plant for its term, contained certain provisions relevant to the commitment by both parties to refrain from strikes or lockouts (R. 253-262). It is evident that the union did not give up the right to strike, nor the employer the right to lock out, at large; other promises contained in the agreement, in exchange for which self-help was given up, measure the extent to which the parties intended to relinquish recourse to strike or lockout.[8]

Looking to the whole agreement to determine the scope of the no-strike commitment, it would seem apparent that it does not prohibit a strike against unfair labor practices. Thus, the parties specified the substantive terms governing the employment relationship; they thereby contracted to be bound by those terms for the duration of the agreement; and the no-strike no-lockout provision is an

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[8] "Labor contracts must be construed in the light of the objects to be accomplished. Each party assumes certain obligations in consideration of the obligations assumed by the other contracting party." *Textile Workers Union* v. *Aleo Mfg. Co.*, 94 F. Supp. 626, 629 (M.D. N.C.).

cause " subject, however, to review under the contract procedures.

Even assuming that the discharge of Ciccone were a matter cognizable under the grievance and arbitration provisions of the contract, petitioners' argument in this respect must nevertheless fail in view of the findings of the Board, approved by the court below as amply supported by the record. Both the trial examiner and the Board found that the strike "was clearly caused and prolonged by the cumulative effects of [petitioners'] unfair labor practices culminating in the discriminatory discharge of Ciccone" and that the "discharge was merely the climactic aspect of [petitioners'] illegal course of conduct" or, as the court below phrased it, "the spark which set off the strike, not the essential cause of it" (R. 328, 342, 367). Given this finding,[22] it is immaterial whether or not the Ciccone discharge may have been open to adjustment under the contract procedures. In any event, it is unreasonable to suppose that the parties contemplated that a discriminatory discharge based upon union considerations was the type of discharge subject to adjustment under the contract procedure. What the parties envisaged was the case of a genuine but disputed discharge for cause which presented a legitimate issue whether the

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[22] "* * * in considering the question of sufficiency of evidence to support an administrative order this Court must and does rely largely on a first reviewing court's conclusion." *Radio Corp. v. United States*, 341 U. S. 412, 415; *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490-491.

express guarantee that there will be no resort to self-help to effect any change or modification of the agreed terms during their life. Correlatively, since differences necessarily arise in the administration of any agreement, the parties also agreed upon a grievance procedure and binding arbitration as a peaceful means of adjusting contract disputes; the no-strike no-lockout provision is an express guarantee that there will be no resort to self-help with respect to those matters that the parties have agreed are to be processed through the contractual adjustment procedure. "It is, of course, entirely obvious that when parties sign a collective agreement, they fully expect that disputes will arise as to its interpretation and application from day to day. That is precisely why the grievance procedure was established. It is the orderly, economic procedure prescribed for *those situations in which a violation of agreement is alleged.*" (Emphasis supplied).[9]

The no-strike no-lockout provision thus has application in relationship to the agreement's specification of substantive employment terms and to the procedural method for resolving differences arising from them. But to conclude that a no-strike commitment also means that employees have given up the right to strike against serious unfair labor practices can find no support in any other part of the agreement. Thus, it could hardly be said that

[9] Opinion of Umpire Shulman in *Ford Motor Co.* quoted at pp. 47-49, Shulman and Chamberlain, *Cases on Labor Relations* (1949).

the settlement of substantive terms of employment implied the employees' agreement to tolerate serious unfair labor practices without striking. Licensing an employer to engage in unfair labor practices without the risk of a strike is not the *quid pro quo* for an agreement on employment terms. Nor does the provision for a grievance procedure and for arbitration suggest that the employees have agreed to forego striking against unfair labor practices. The sole disputes arbitrable under the contract, and therefor the only ones for which there was a contractual adjustment procedure, were "differences * * * as to the meaning and application of the provisions of this agreement, including questions of meaning, interpretations, operation or application of any clause of this agreement or any breach or threatened breach of this agreement." Petitioners' commission of unfair labor practices, which in their cumulative effect caused the strike (*supra*, pp. 8-10), was not a "difference" within the purview of this provision; it had nothing to do with the meaning, interpretation, operation, application or breach of the agreement as these words are customarily used in a contract context; it was therefore outside the contractual method for the solution of disputes. It is not fairly inferrable that the union relinquished the right to strike over a subject for which the contract provided no substitute method of settlement.[10]

As the Court of Appeals for the Seventh Cir-

[10] 21 Geo. Wash. L. Rev., *The No-Strike Clause*, 127, 153, 157-163.

cause asserted existed or was adequate to support the discharge.[23] This inference is buttressed by the fact that the normal and legally exclusive forum for unfair labor practice adjudication is the Board and not arbitration.[24]

Petitioners do not explain how their illegal efforts to insure the Paper Workers' succession to the Carpenters as bargaining representative of the employees after the expiration of the contract gave rise to issues relating to the meaning and application of the recognition and union security provisions of the agreement. Although petitioners were attempting to undermine the Carpenters' majority status and thereby preclude its continuance as bargaining representative after the expiration of the contract, no controversy had arisen that petitioners were failing to accord the Carpenters the recognition to which it was entitled during the life of the contract or that the employees were de-

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[23] Discharge cases giving rise to the meaning and application of agreements "may involve a variety of questions: the manner in which employees are informed of the conduct expected of them, the procedure used in the imposition of discipline, the sufficiency of the cause for penalty, the adequacy of the evidence to establish guilt or innocence or justification, the reasonableness or propriety of the particular penalty imposed, and so on." Shulman and Chamberlain, *Cases on Labor Relations*, p. 366 (1949).

[24] *National Labor Relations Board* v. *UAW, Local 291*, 194 F. 2d 698 (C.A. 7); *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 48 (C.A. 9), certiorari denied, 324 U.S. 877; *National Labor Relations Board* v. *Bell Aircraft Corporation*, 206 F. 2d 235, 237 (C.A. 2); cf. *National Labor Relations Board* v. *General Motors Corporation*, 116 F. 2d 306, 312 (C.A. 7).

cuit, interpreting a no-strike clause similar to the one here, stated (*Wagner Iron Works, supra*, 220 F. 2d at p. 140):

> The "no-strike" clause must be interpreted in the light of other terms of the contract. The agreement covers rates of pay and working conditions, and its remedial provisions do not purport to extend beyond that. Thus, as we have observed, the grievance procedure is expressly designed to settle disputes over the "meaning, application or interpretation of this agreement"; the arbitration provision is expressly limited "to the interpretation and application of the express terms of this agreement"; the policy statement of the parties, which forms a basis for the "no-strike" and "no-lock-out" clauses, is an agreement that such procedures are adequate "to provide a fair determination of all grievances which may properly arise under the terms of this agreement." The no-strike clause which follows immediately after this statement must be construed, as equally restricted, *i.e.*, as a surrender of the right to require a change in the contract or as a means of settling any dispute which is embraced by its terms. Since the contract does not purport to reach all conceivable phases of employer-employee relations, this clause can not well be interpreted as a surrender of the right to self-help, as a measure to protest against unfair labor practices.

Accordingly, the court below properly concluded that the strike was not within the prohibition of the no-strike commitment, for that promise "is operative only as regards strikes growing out of disputes concerning those matters covered by the contract provisions or arising out of the normal relations of the parties" (R. 366).[11] This interpretation of the no-strike clause of the collective bargaining agreement is in keeping with the normal

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[11] The decision, *Matter of Western Union Telegraph Co.*, 299 N. Y. 177, 86 N. E. 2d 162, relied on by petitioners (Br. 43) does not reach the problem posed here. There, the New York Court of Appeals merely held that an arbitrator, in construing a no-strike clause in a contract in the light of practices prevalent in the particular industry, had exceeded his authority under the contract which provided that the arbitrator was without authority to alter or modify any of the express provisions of the contract.

In this connection it may also be noted that, in their brief to the court below (p. 15), petitioners stated that, under the law of New York where the contract was executed, "no arbitration clause, whether its form be 'broad' or restricted, can be written which will give an arbitrator jurisdiction to prevent unfair labor practices," citing *Benedict* v. *Limited Editions Club, Inc.*, 39 N. Y. Supp. 2d 852, 853 (Supreme Court, Appellate Division), where the court stated:

> The question submitted to the arbitrator was not an arbitrable one under the provisions of Section 1448 of the Civil Practice Act. Accordingly, the Special Term had no power on motion to confirm such an award, or to direct entry of judgment thereon. Only matters which can be made the subject of an action may be submitted to arbitration under that section. * * *
>
> By statute, the exclusive method for reinstatement available to the two employees engaged in interstate commerce, allegedly discharged for labor activities, would be upon a proceeding had before the National Labor Relations Board. * * *

See also p. 43 n. 24, *infra*.

understanding of the function of no-strike no-lockout clauses. The late Dean Harry Shulman, acting as permanent arbitrator under the Ford-UAW (CIO) collective bargaining agreement, explained with respect to that agreement, but in terms which have pertinence here, that (*Ford Motor Co.*, 6 Lab. Arb. Rep. 799, 801-802 (1947)):[12]

> The no-strike portions [of the agreement] merely state in express words what would be implied in the rest of the contract if they were omitted.
>
> Thus, Section 1 of Article V prohibits strikes on matters which may be finally determined by the umpire or to avoid the effects of a decision by him. Now the whole purpose of a grievance procedure with a terminable step of arbitration is to substitute that method of adjustment for strikes, lockouts, and similar measures of self-help. The very provision of a grievance procedure and of an umpire whose decisions are final means that there must be no strikes on matters within his jurisdiction or for the objective of avoiding

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[12] See also, *General Teleradio, Inc.*, 18 Lab. Arb. Rep. 418, 427-428; *Brynmore Press, Inc.*, 7 Lab. Arb. Rep. 648, 653-654; *Simplicity Pattern Co.*, 7 Lab. Arb. Rep. 180, 182-183; *Aluminum Co. of America*, 7 Lab. Arb. Rep. 442, 447; *C. G. Hussey & Co.*, 7 Lab. Arb. Rep. 590, 594; *Armour & Co.*, 8 Lab. Arb. Rep. 758, 770; *Rheem Mfg. Co.*, 8 Lab. Arb. Rep. 85, 87. And see the excerpts from the arbitration decisions in *Philadelphia-Marine Trade Assn.* v. *ILA*, 34 LRRM 2087 (Pa. Ct. of Com. Pleas, April 21, 1954).

the effects of his decisions. Section 1 merely makes that meaning express.

Again, that section prohibits strikes to change or add to the contract or on matters which the contract specifically commits to the company's discretion. Now surely this is no more than would be true without express statement. The whole purpose of the collective agreement is to state the terms of employment for its duration. The parties agree to accept those terms until a fixed date. To strike for an alteration prior to that date would be to destroy the fundamental purpose and idea of the contract. Accordingly, such a strike would be a violation of the contract even without the express statement.

The Bureau of Labor Statistics states in like tenor that (Bull. No. 908-13, U. S. Dept. of Lab., Bur. Lab. Stat., p. 1 (1949)):[13]

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[13] See also, 3 President's Natl. Lab.-Man. Conf. 140 (1945) ("* * * grievances and disputes involving the interpretation and application of the agreement will * * * inevitably arise, for the adjustment of which adequate provision should be made. This requires procedural clauses for the settlement of such grievances and disputes, and a firm commitment by Managements and Unions that these procedures will be followed as a substitute for strikes and lockouts"); Peterson, *Settlement of Grievances Under Union Agreements*, 50 Monthly Lab. Rev. 286, 287 (1940) ("Throughout all steps in the adjustment process it is understood that strikes and lockouts are to be used only after all other methods provided for the adjustment of the dispute have failed."); McCabe, *Machinery for the Adjustment of Disputes Under New Collective Agreements*, 5 Law & Contemp. Prob. 261, 271 (1938) ("It is almost a universal corollary of the inclusion of an ad-

simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred; provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

Section 8(d) then provides that:

* * * the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.[25]

Section 8(d) concludes with a provision stating the disability visited upon an employee who engages

[25] This sentence is preceded by the presently immaterial statement that: "The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) * * *."

> The existence of a collective bargaining agreement implies that no work stoppage will take place while peaceful adjustment procedures are available, and almost every agreement outlined in considerable detail the machinery and the steps to be followed for the settlement of disputes and other grievances. Many contracts contain explicit prohibition of restrictions on work stoppages—whether these be strikes or lockouts. Such "no-strike, no-lockout" clauses are designed as extra assurance that the contract procedure will be used and used fully before resorting to a strike or lockout.

It is thus clear that a pledge not to strike is not a promise dissociated from the remainder of the agreement but has its reason for being in the substantive terms settled by the agreement and in the contractual adjustment process that the agreement creates as a substitute for self-help with respect to contract differences. The interrelation is further shown by holdings that if the employer refuses "to arbitrate, the union will have the right to treat the contract as breached and to consider itself relieved from the obligation to refrain from striking." *Local 1111, U.E.R. & M.W.* v. *Allen-Bradley Co.*, 255 Wis. 613, 617, 39 N.W. 2d 740, 742; *Boeing Air-*

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justment procedure in a collective agreement that there shall be no strike or lockout until the procedure has been exhausted."); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 308-309 (1948).

"in a strike within the sixty-day period specified in this subsection":

> Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Petitioners' principal argument (Br. 19-22) that the unfair labor practice strike in this case violates Section 8(d) runs as follows: the words "any employee" and "a strike" in the last quoted clause are without limitation and therefore mean any strike, without regard to its character, and that it is of no significance that the provisions preceding this clause relate to the requirements which must be satisfied in order to effect changes in existing contract terms. In this manner petitioners would render irrelevant the fact that the strike here was induced by their own unfair labor practices.

Petitioners' insistence upon isolating the concluding sentence of Section 8(d) fails, as the court below pointed out (R. 368-369), to give "due consideration" to the language of Section 8(d) "as a whole" and to the Congressional purpose reflected in the Section in its entirety and confirmed by its legislative history. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the

*plane Co. v. Aeronautical Industrial Lodge*, 91 F. Supp. 596, 608 (W.D. Wash.), affirmed, 188 F. 2d 356 (C.A. 9), certiorari denied, 342 U.S. 821; *General Teleradio, Inc.*, 18 Lab. Arb. Rep. 418, 427-428.[14] In sum, where the dispute concerns a matter not within the contractual adjustment procedure and the normal day-to-day relations of the parties, where there is no attempt to alter an agreed substantive term of employment, and where the integrity of the contract as an instrument governing the normal relations between the parties is otherwise unaffected, there is no obligation to refrain from striking. In the absence of a showing to the contrary, and none exists in this case, a no-strike commitment, we submit, is not to be interpreted to extend outside the field of the contract and the normal day-to-day relations of the parties,[15] and to preclude a strike caused by and in protest of unfair

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[14] Annotation, 2 A.L.R. 2d 1278, 1285: "Whatever restrictions upon the right to strike or to picket may flow from the existence of a collective labor agreement between the parties, such restrictions do not apply where the employer himself has first breached the agreement * * * and this rule applies even though the agreement contains an anti-strike pledge."

[15] After the Board's decision and order herein was issued, petitioners attempted to introduce further evidence concerning certain proposals made by the Carpenters during negotiation of the 1949 contract (R. 360). One of these proposals was that "all disputes, whether or not arising from contract be referred to arbitration" (R. 361). Petitiongrs' rejection of this proposal lends additional support to the view that it was not within the contemplation of the parties to extend the no-strike clause to matters outside the field of the contract and the normal day-to-day relations of the parties.

labor practices committed by an employer, as in this case.

Another important reason requires this result. The right to strike may no doubt be waived, but as with every waiver of a statutory right, it must be "clear and unmistakable." *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956, 958 (C.A. 5). Accord: *National Labor Relations Board* v. *Wagner Iron Works*, 220 F. 2d 126, 141 (C.A. 7). See also, *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F. 2d 149, 153 (C.A. 9); *National Labor Relations Board* v. *Otis Elevator Co.*, 208 F. 2d 176, 179 (C.A. 2).

As both the court below (R. 366-367) and the Seventh Circuit (220 F. 2d at p. 141) have stated, the right to strike to protest against the commission of unfair labor practices is fundamental. Congress preserved the right to strike to oppose unfair labor practices despite the availability of an administrative remedy before the Board as an alternative to self-help (*infra*, pp. 58-59); more than that, unlike employees striking in support of an economic demand who run the risk of permanent replacement while on strike, unfair labor practice strikers normally have an absolute right to reinstatement upon their unconditional application despite intervening replacement.[16] To infer a waiver of these

[16] *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. 2d 432, 437 (C.A. 7); *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 16-17 (C.A. 1); *National Labor Relations Board* v. *Crosby Chemicals, Inc.*, 188 F. 2d 91, 95

rights is to hold that the employees have surrendered special statutory protection with no showing that they have gained from their employer a corresponding consideration. And the consequences of such surrender are drastic; deprived of a status of virtually absolute protection, the employees are now in the opposite position of engaging in unprotected activity and therefore being open to peremptory discharge or discipline at the employer's wish. Relinquishment of this statutory right with these serious consequences should rest only upon the clearest expression of intent. No such expression appears here. As both the court below (R. 366-367) and the Seventh Circuit have pointed out (*Wagner Iron Works, supra*, 220 F. 2d at 141):

> The right of employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition.

2. Apart from the foregoing, even assuming that the no-strike commitment is as broad in scope as petitioners assert, it is not denied that any breach in this case was provoked by the serious unfair

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(C.A. 5); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928; *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9).

labor practices on petitioners' part. Hence, as the Board held (R. 343, 345, n. 9), petitioners "should not be allowed to assert, as a defense, a strike which was caused by their own wilful, deliberate, widespread, and grave unfair labor practices."

It is a principle of general contract law that "One who is himself the cause of another's nonperformance cannot charge the other with breach of duty * * *." Corbin on *Contracts*, § 770 (p. 964). For, "When a contract is made, legal duties may be created that the parties themselves did not intend. * * * Neither one may expressly promise that he will forbear to put hindrances in the way of performance by the other * * *. Nevertheless, a contract creates duties of this sort; and a breach of contract may be committed by prevention, hindrance or repudiation." *Id.*, § 944. And so, "To one who is sued for nonperformance of his promise it is a defense if he can prove that his performance was prevented or substantially hindered by the plaintiff." Id., § 947 (p. 814); see also §§ 1264, 571 (p. 211).[17] As explained in *Patterson* v. *Meyerhofer*, 204 N.Y. 96, 100-101, 97 N.E. 472, 473:[18]

> [It is] the general rule that a party who causes or sanctions the breach of an agreement is

[17] And see, Williston, *Contracts*, §§ 677, 887A (Rev. Ed. 1936); *Restatement, Contracts*, §§ 295, 315, 317.

[18] See also *Stevens* v. *Howard D. Johnson Co.*, 181 F. 2d 390, 393 (C.A. 4); *Tradewell Foods, Inc.* v. *New York Credit Men's Adjustment Bureau*, 179 F. 2d 567, 568 (C.A. 2); *Atlas Trading Corp.* v. *S. H. Grossman, Inc.*, 169 F. 2d 240, 244 (C.A. 3); *Vanadium Corp. of America* v. *Fidelity & Deposit Co.*, 159 F. 2d 105, 108 (C.A. 2).

thereby precluded from recovering damages for its non-performance or from interposing it as a defense to an action upon the contract. (*Young* v. *Hunter*, 6 N.Y. 203; *Barton* v. *Gray*, 57 Mich. 622 [24 N.W. 638], and cases there cited).

"Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which may hinder or obstruct that other in doing that thing." *Gay* v. *Blanchard*, 32 La. Ann. 497.

Where the promisee has itself obstructed performance "it is unimaginable that any civilized system of law would allow it to recover * * * for a failure to perform." *Porto Rico* v. *Title Guaranty and Surety Co.*, 227 U.S. 382, 389; see also *United States* v. *Peck*, 102 U.S. 64, 65-66. "And that rule applies to labor contracts." *United Electrical, etc. Workers* v. *National Labor Relations Board*, 223 F. 2d 338, 341 (C.A. D.C.), pending on petition for certiorari, No. 343, this Term.

It is clear that the strike in this case was caused by petitioners' own wrongful conduct in engaging in serious unfair labor practices. Those grave wrongs substantially hindered compliance with any no-strike pledge, because forbearance to strike in the face of such unlawful provocation cannot reasonably be expected of employees or their bargaining representative. By engaging in an illegal course of conduct calculated to destroy the bargaining representative of the employees, peti-

tioners created a state of affairs virtually equivalent to prevention of any pledge not to strike. This being so, they cannot assert as a defense nonperformance for which they were responsible. "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect "this is your own act, and therefore you are not damnified.' [Citations.] Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. * * * A suit may not be built on an omission induced by him who sues." *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 61-62.[19] And so, as the Board concluded (R. 325-326, 345, n. 9):

> Surely, an employer, who like [petitioners] here, by his own wilful, deliberate, widespread, and grave unfair labor practices, has caused his employees to protest in a traditional way his disposition to violate the law, should not be allowed to assert that his employees forfeited their normal rights to statutory protec-

[19] See also *Stockstrom* v. *Commissioner of Internal Revenue*, 190 F. 2d 283, 288-289 (C.A. D.C.).

tion, because of an alleged contract violation flowing from the very strike for which he was responsible. To hold that such employer misconduct does not excuse employee performance of a "no-strike" clause would be offensive both to the spirit of the Act and to one's sense of right. More than that, it would—in the words of Chairman Herzog in his concurring opinion in the *National Electric Products* case [80 NLRB 995, 1002]—be "likely to encourage the commission of [employer] unfair labor practices of such provocative magnitude that, human nature and the Board's delays being what they are, employees can reasonably be expected—or intended—by their employer to turn to what may prove to be suicidal self-help."

* * * * *

To require employees in a situation such as appears in the instant case, where time is of the essence, to forego self-help in favor of the time consuming remedial processes of the Board, or, if they would engage in self-help, to risk discharge, is to invite them to court disaster whichever way they turn.[20]

3. Petitioners urge that Section 13 of the Act precludes the construction of the no-strike clause adopted by the Board and approved by the court below. The argument is (Br. 40) that the no-strike clause in the contract is a "limitation

[20] See 53 Col. L. Rev. 1023, 1025.

signed to eliminate " 'quickie strikes' " as part of the bargaining process during successor contract negotiation; it merely made it mandatory for "all [unions to] follow the sound, fair, and sane procedure which a majority of the good ones now follow." 93 Cong. Rec. 3014, in 2 Leg. Hist. 1496. That "sound, fair, and sane procedure" has been described as follows (Bull. 908-19, Dept. of Lab., Bur. Lab. Stat., p. 35 (1950)):

> Most contracts specify a fixed period of notice, usually 60 days, prior to the expiration date, in the event either party desires to modify or terminate the agreement on expiration. In both open-end and term contracts, provision is generally made for advance notice by either party of intention to modify or cancel the agreement. In the absence of a specified requirement for notice, it can be assumed that conferences on the contract would be initiated on the request of either party. Some agreements distinguish between requests for termination and for modification or amendment, and usually require a longer period of notice for termination. *The notice requirement is designed in order to give each party adequate time to study the issues, consider the other party's position, and to prepare its case.* [Emphasis supplied.]

Certainly it is no part of this "sound, fair, and sane procedure," which a "majority of the good [unions] now follow," to give the employer 60 days

or qualification" of the right to strike, and that under Section 13 it is not permissible to construe the Act "to diminish a limitation or qualification of the right to strike agreed upon by the parties." But Section 13 refers to "limitations or qualifications" on the right to strike in the Act itself. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 673; *United Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 258-259; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 59, in 1 Leg. Hist. 563.[21] And, as the Board stated (R. 345), "Section 13 * * * enjoins *construction of the statute* which 'affect' limitations on the right to strike. It is sufficient to note * * * that it is not the Act or any part thereof which has been construed herein to limit the no-strike clause, * * * but the terms and scope of the clause itself." The court below, agreeing with the Board, stated (R. 369-370) that the argument necessarily "presupposes a limitation and has no significance as to whether there is one," which is the very question here in issue.

Furthermore, Section 13 also prohibits implying

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[21] Explaining the Section, the Conference Report stated:

> Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right.

an abridgment of the right to strike with the result that the effect of Section 13 is entirely neutral in a situation such as the present. If Section 13 has any effect, it is to support the Board's view. It is one of the provisions by which Congress "expressly recognized the 'right to strike'" (*C. A. W. v. O'Brien*, 339 U. S. 454, 457), and as a rule of construction, "By § 13, Congress has made it clear that * * * all * * * parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act." *National Labor Relations Board v. International Rice Milling Co.*, 341 U. S. 665, 673.

Petitioners also assert (Br. 40-42) that each of the unfair labor practices found by the Board to have preceded the strike did in fact relate to matters involving the "meaning, interpretation, operation, or application" of various clauses in the contract and were therefore subject to the contractual adjustment procedures. Thus, petitioners assert that (a) the findings with respect to petitioners' illegal assistance to the Paper Workers to insure its succession to Carpenters as the employees' bargaining representative was a matter covered by the recognition clause in the contract; (b) the finding that petitioners induced employees to join the Paper Workers is covered by the union-security clauses; and (c) Ciccone's discharge was a matter cognizable under the clause providing that the employer might discharge any employee "for proper

in which to commit serious unfair labor practices without risking an immediate strike in opposition to them. Such a moratorium is irrelevant to the objective of the prescribed notice which is "to give each party adequate time to study the issues, consider the other party's position, and to prepare its case."

To support the view that Section 8(d) prohibits an unfair labor practice strike during the 60-day period of notice, reliance is placed (R. 355) on statements of the minority, not specifically controverted, to the effect that under Section 8(d) "provocative conduct" by the employer during this period must be countenanced without "resort to self-help" and is to be dealt with through a Board order to " 'cease and desist' from such practices." S. Min. Rep. No. 105, 80th Cong., 1st Sess., 21-22, in 1 Leg. Hist. 483-484; 93 Cong. Rec. 6385, in 1 Leg. Hist. 887; 93 Cong. Rec. 4036, 6503, in 2 Leg. Hist. 1049, 1580. The short answer is that the views of opponents to legislation, who not infrequently may voice an extreme interpretation in order to defeat it, are not the most reliable index to the congressional intent. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of statutory words is in doubt."); *S. H. Camp* v. *National Labor Relations Board*, 160 F. 2d 519, 521 (C.A. 6), and cases cited.

From the enactment of the Act in 1935, it has been

faulting in carrying out the union security obligations prescribed by the agreement. Indeed, the Board rejected the claim that petitioners had refused to bargain with the Carpenters on any bargainable matter during the contract or that petitioners had committed an anticipatory breach of the contract by aiming to supersede the bargaining agent during, rather than at the end of, the contract term (R. 323, 340). In these circumstances, there was no occasion to resort to the adjustment procedures of the contract.

## II

**Section 8(d) of the Act Does Not Apply to Employees Who Engage in a Strike, the Purpose of Which Is Not to Terminate or Modify an Existing Collective Bargaining Contract But to Protest Against the Employer's Unfair Labor Practices**

The contract between the Carpenters and petitioners was to expire on November 30, 1950 (*supra*, p. 3). The union's notice "requesting modification of our contract with you" and a meeting "for the purpose of negotiating such modification" was served on petitioners on October 10, 1950 (R. 23, 263). The strike began on November 10, 1950, less than 60 days after the notice of modification (*supra*, p. 6). Petitioners contend that under Section 8(d) of the Act no strike may take place before the expiration of the "waiting period" prescribed in that section; that employees engaging in such a strike lose their protected status as employees; and that petitioners were therefore free to discharge

the strikers. The court below rejected this contention, finding that the strike was neither called nor continued to effect a modification of the contract and holding that Section 8(a) has application only to strikes pertaining to contract negotiation and not to strikes protesting, as here, the commission of unfair labor practices (R. 367-369).

The Board found that the strike was caused and prolonged solely by petitioners' unfair labor practices and was designed to protest and remedy their commission. More specifically, the Board, adopting the trial examiner's findings, concluded as follows (R. 329):

> * * * the purpose of the strike was to protest and seek to remedy [petitioners'] unfair labor practices. The record does not support a finding that the strike also had as an additional objective the termination or modification of the existing contract. It is true that demands for contract changes had previously been presented to [petitioners] and there had been some discussion at meetings of [the Carpenters] of a possible strike if such demands were not met. But no strike vote on that issue had ever been taken, nor was any strike action otherwise determined upon. On the record as a whole, I am fully satisfied, and I find, that the strike which immediately followed Ciccone's discharge was unplanned and began as a spontaneous demonstration by employees of their protest of [petitioners'] unfair labor practices.

> Nor does the record reflect that its character changed after it began to one where the strikers were seeking to compel changes or modifications in economic terms or conditions of employment. There is no evidence that any negotiations were conducted, or overtures made, along such lines at any time after the commencement of the strike. [Petitioners] at the hearing made no such claim, and offered no evidence to establish that the strike had any purpose other than, or in addition, to that claimed by the General Counsel.

The court below approved these findings as "based upon ample evidence" (R. 368) and petitioners do not challenge them.

The question presented, therefore, is whether Section 8(d) of the Act prohibits a strike, unconnected with advancing any contract demand, to protest and remedy unfair labor practices, except upon expiration of the "waiting period" prescribed in that Section. Section 8(d) contains the Act's definition of the duty to bargain collectively. It begins with the statement that:

> For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and

the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

It continues with a proviso specifying the method to be followed in effecting the termination or modification of an existing collective bargaining agreement:

*Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and

whole law, and to its object and policy." *United States* v. *Boisdore's Heirs*, 8 How. 113, 122; *Peck* v. *Jenness*, 7 How. 612, 622-623. As the court below stated (R. 368), to ascertain the true meaning of Section 8(d), "as usually must be done in interpreting a statute, all of its provisions should be read in the light of the legislative purpose and with reference to each other." Looking to the whole of Section 8(d), it is clear that the concluding clause stating that a striker "shall lose his status as an employee" specifies the sanction. The prohibition for the violation of which the sanction applies is to be found in the preceding subsections. And reading the prohibition and the sanction together shows that Section 8(d) does not forbid an unfair labor practice strike.

Thus, it is evident that Section 8(d) is devoted entirely to the orderly functioning of the bargaining process. Dealing first with the general elements of the duty to bargain, it next specifies the particular requirements in the special situation of a "party desiring * * * termination or modification" of an existing agreement. Sixty days' notice of the "proposed termination or modification" must be given; an offer to meet and confer "for the purpose of negotiating a new contract or a contract containing the proposed modifications" must be made; and if no agreement is reached within thirty days, notice of the existence of the dispute must be given the federal and state conciliators and mediators. And in order that these procedures may have a fair chance to succeed, all the "terms and condi-

tions of the existing contract" must for the sixty-day period of the notice, or until the expiration of the contract if that is later, remain "in full force and effect, without resorting to strike or lock-out."

It is plain that a strike or lockout is prohibited during the "waiting period" prescribed in Section 8(d), only when recourse to it is for the purpose of effecting changes in existing contract terms. The statutory scheme is based on the hope that a 60-day "waiting period" of uninterrupted negotiation, with the help where necessary of federal or state conciliators, will produce agreement without the need for recourse to industrial strife. And so the statute enjoins resort to a strike by a union or a lockout by an employer to compel either party to accede to the contract demands of the other before the expiration of that "waiting period." In short, Section 8(d) provides, as the Seventh Circuit, in full accord with the court below, has stated, "an orderly method for the modification or termination of existing agreements by proscribing, during the sixty-day cooling off period, strikes which interfere with the operation of the statutory method, *i.e.*, strikes to compel termination of the agreement or modification of its terms. That section has no application to a strike caused by an employer's unfair labor practices, in no way concerned with questions of termination or modification of the existing agreement." *Wagner Iron Works, supra*, 220 F. 2d at p. 141.

To give the prohibition against strikes or lockouts in Section 8(d) greater scope than this leads to

consequences so incongruous that it cannot reasonably be inferred that Congress meant to require them. It would mean that, once a union gives notice of modification or termination of an existing agreement, an employer acquires a minimum 60-day period during which he may engage in serious unfair labor practices without risking a strike in protest. No such license can possibly be justified in terms of the aim of Section 8(d) to provide for orderly renegotiation of agreements. It would mean that a union satisfied with its contract, and therefore having no desire for its modification or termination, may strike against unfair labor practices, but a union dissatisfied with its contract, and having therefore given notice of modification or termination, loses this right for a minimum of 60 days. There is no rational justification for presuming that a union's exercise of the right to negotiate a successor agreement entails the loss of the right to protest unfair labor practices by strike action. It would mean that a union without a contract—but which is in the process of negotiating its first one—may strike against unfair labor practices, but that a union which has given notice of contract termination or modification—and is negotiating its second contract—may not for a minimum of 60 days strike against the identical unfair labor practices. Again, there is no discernible reason why the contracting union should be under a disability from which the union without a contract is free where both are in the process of negotiating an agreement. As the

court below pointed out (R. 369), petitioners' reading of the Act would attribute to Congress:

> * * * the intent not merely to provide for an orderly way to terminate or modify existing collective bargaining agreements but the intent both to give an employer, by taking advantage of the method, an opportunity to indulge in unfair labor practices which employees would, perhaps, find it too hazardous to resist quickly and effectively by means of a strike, and to require employees, who used the method, to do so on pain of giving the employer just such an opportunity. It would discriminate, in respect to the right to resist unfair labor practices by striking, between employees working under a collective bargaining contract and those who were not and between unions who were satisfied with such existing contracts and those who were not. And it would penalize the latter for attempting lawfully to remedy their conditions by peaceful bargaining. In view of the well known purpose of the Act to prevent industrial strife, such an intent should not be attributed to Congress until, and unless, if sees fit to say so in clear and uncertain terms.[28]

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[28] Cf. 53 Col. L. Rev. 1023, 1025:

> [The Board's decision] manifest[s] a realistic approach to the legal problems peculiar to labor-management relations. Since invocation of the Act's protective machinery is time consuming, if Section 8(d) were applied to unfair labor practice strikes, the employer, im-

The legislative history confirms the view that Section 8(d) was not intended to apply to strikes called to protest and remedy unfair labor practices. The committee reports set forth below suggest no broader scope for the Section than providing an orderly method for negotiating successor agreements. S. Rep. No. 105, 80th Cong., 1st Sess., 24, 1 Leg. Hist. 430;[27] H. Conf. Rep. No. 510, 80th Cong.,

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mune during the critical 60-day period from the employees' only effective remedy, could engage in unfair practices designed to coerce employee concessions in the contract renegotiations—thus perverting the purpose of the section. The delay involved in using Board procedures also weakens the argument that unfair labor practice strikes violating no-strike clauses should be deemed unprotected in order to encourage recourse to the orderly processes of the Board. Moreover, the Board's approach to the no-strike clause accords with the view that collective bargaining agreements should be construed as charters governing a continuous complex relationship rather than as commercial agreements subject to technical contract rules. Even on the basis of contract law, however, the result finds support in the doctrine of constructive conditions of cooperation—that there is an implied understanding that neither party to a contract will affirmatively hinder performance by the other and if such hindrance occurs non-performance by the innocent party is excused.

[27] "Another substantive feature of this subsection is a provision which relates to employers and labor organizations which are parties to collective agreements. Most agreements have an expiration date, with an automatic renewal clause in the absence of advance notice by either side of a desire to terminate or modify. Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the terminal date, if they desire to terminate or amend. Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing the old contract has the duty to notify the new Federal Mediation Service of the impasse. Should the

1st Sess., 34-35, in 1 Leg. Hist. 538-539.[28] Senator Taft described Section 8(d) as a "revision of the collective-bargaining procedure, in connection with the mediation process," designed to "afford time for free collective bargaining, and then for the intervention of the Mediation Service." 93 Cong. Rec. 3839, in 2 Leg. Hist. 1015. Senator Ball, a manager of the amendments in the Senate and one of the conferees, stated that Section 8(d) was de-

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notice not be given on time, irrespective of the presence or absence of a 60-day clause in the collective agreement, it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period. Any employee who engages in a strike during the 60-day period would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed."

[28] "The Senate amendment also required, as part of the bargaining procedure, that no party to any collective bargaining contract should terminate or modify the contract unless the party desiring such termination or modification (A) served a written 60-day notice of the proposed termination or modification on the other party, (B) offered to meet and confer with the other party with respect thereto, (C) notified the Federal Mediation and Conciliation Service (a new independent agency later discussed) within 30 days after such notice of the existence of the dispute, if agreement had not been reached by that time, and (D) continued in full force and effect, without strike or lock-out, all the terms and conditions of the existing contract for a period of 60 days after the notice of desired termination or modification was given or until the expiration date of the contract, whichever occurred later.

"An employee who engaged in a strike within the 60-day period just described lost his status as an employee of the particular employer for the purposes of sections 8, 9, and 10 of the act."

clear that employees are not confined to the processes of the Board to redress unfair labor practices, but may resort to concerted activity for that purpose, and such recourse is itself protected.[29] And, in 1947, Congress repeatedly rejected proposals to cut down the right to strike against unfair labor practices. Thus, Senator Ball introduced a bill which, *inter alia*, would have amended Section 2(3) of the Act to provide that "The term 'employee' * * * shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute (unless, while engaging in a strike, such individual has been replaced or has refused an offer of reinstatement * * * )."[30] During discussion of the bill on the floor of the Senate, Senator Morse pointed out that the effect of the amendment would be to eliminate the established distinction between employees engaged in economic strikes and those striking against employer unfair labor practices. Senator Ball replied, "I am inclined to agree that * * * the bill does go too far and has an effect which I did not foresee when we drafted it."[31] Similarly, amendments containing provisions which prohibited "any

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[29] "* * * to hold that a worker who because of an unfair labor practice has * * * gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby." Senate Report No. 573 on S. 1958, 74th Cong., 1st Sess. (1935), pp. 6-7. See also, cases cited *supra*, p. 34, n. 16.

[30] S. 360, 80th Cong., 1st Sess., Sec. 2(b), p. 3 (January 27, 1947).

[31] 93 Cong. Rec. 1827-1828, in 2 Leg. Hist. 955-957.

strike or other concerted interference * * * to remedy practices for which an administrative remedy is available," and depriving employees engaging in such activities of "rights under this Act," were specifically considered and rejected.[32] And, although Section 9(c)(3) provides that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote" in Board conducted elections, this limitation is not applicable to unfair labor practice strikers. See *Union Mfg. Co.* v. *National Labor Relations Board*, 221 F. 2d 532 (C.A. D.C.), certiorari denied, 349 U.S. 921. It would seem evident, therefore, that Congress rejected any restriction upon the traditional right of employees to engage in a concerted activity for the purpose of protesting and opposing an unfair labor practice.

Petitioners further assert, however (Br. 23-33), that the concluding sentence of Section 8(d) denies to strikers employee status "for the purposes of

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[32] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C)(ii) and (d), in 1 Leg. Hist. 205-207; S. 360, 80th Cong., 1st Sess., Sec. 13 (b) (2) (January 27, 1947). Explaining the purpose of one of these proposed but rejected amendments, the House Report stated (H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 44, in 1 Leg. Hist. 335):

> Strikes and other concerted activities in lieu of using peaceful procedures for settling disputes that the National Labor Relations Act provides are unjustifiable on any grounds. Congress has provided elaborate machinery for handling disputes over recognition, bargaining rights, and alleged unfair labor practices. Those who turn to striking instead of using the procedures that Congress has provided certainly are not entitled to the immunity that they now enjoy under the Labor Act and other laws.

sections 8, 9, and 10 of this Act" and that the reference to these sections bespeaks a Congressional intent to include within the prohibition of Section 8(d) any type of strike, whether in support of contract termination or modification or in protest against unfair labor practices unrelated to contractual matters. The argument is merely a further projection of petitioners' erroneous insistence upon looking solely to the concluding sentence of Section 8(d) to determine the Congressional purposes.

Sections 8, 9 and 10 are the statutory provisions which implement the rights and remedies available to employees under the Act. Thus, Section 8 defines the type of employer conduct proscribed by the statute as unfair labor practices. Section 9 deals with the designation of bargaining representatives by employees, including the right of employees to petition the Board for a determination of bargaining representatives and the right to vote in representation elections. Section 10 empowers the Board, in relevant part, to prevent any person from engaging in the prohibited unfair labor practices and to direct such relief, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.

The reference to those sections in Section 8(d) makes specific the sanctions which Congress sought to impose upon employees participating in strikes called in violation of that Section. The legislative history of the Act suggests that Congress was aware that the Board, in determining whether

strike misconduct occurring in the course of a lawful strike deprived the participants of their reinstatement rights, had held that such misconduct did not necessarily cause a forfeiture of the strikers' right to reinstatement under the Act and that the question turned upon whether, in the light of all the circumstances, the misconduct was sufficiently serious to render the employee unfit for further employment or, stated differently, whether reinstatement would effectuate the policies of the Act.[33] With respect to Section 8(d) strikers, Congress did not wish to leave open to the Board the determination whether the reinstatement of such strikers would or would not in the particular circumstances effectuate the policies of the Act. Congress itself made that determination. Accordingly, it specified in the Section the sanctions which strikers would incur for failure to observe the "waiting period" requirements and made these sanctions automatic. Thus, the specification of these sanctions leaves unanswered the question as to the type of strikes to which they apply. The answer to that question must still be determined from the Section as a whole, particularly the provisions of the Section which precede the concluding sentence. So read, Section 8(d), as we have demonstrated, is limited to strikes over contract termination or modification and does not reach strikes in protest against an employer's unfair labor practices.

[33] See H. Rep. No. 245, 80th Cong., 1st Sess., p. 27, in 1 Leg. Hist. 318; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 38-39, in 1 Leg. Hist. 542-543.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

SIMON E. SOBELOFF,
*Solicitor General.*

THEOPHIL C. KAMMHOLZ,
*General Counsel,*
DAVID P. FINDLING,
*Associate General Counsel,*
DOMINICK L. MANOLI,
*Assistant General Counsel,*
*National Labor Relations Board.*

SEPTEMBER, 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage membership in any labor organization: * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating

a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period speci-

fied in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be

the employer unit, craft unit, plant unit, or subdivision thereof: * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that

such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

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PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

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